



**The Comptroller General
of the United States**

Washington, D.C. 20548

Van Schaik

Decision

Matter of: Electro Design Manufacturing, Inc.

File: B-234848

Date: July 14, 1989

DIGEST

1. Protest that agency should not have settled litigation by reinstating firm in competitive range is untimely since it was filed months after protester received letter from agency that informed it of settlement agreement and protester does not argue that it did not know of litigation at the time of settlement agreement. Protester should have filed protest prior to due date for best and final offers or at least made some timely effort to find information needed to file such a protest.

2. Protest that proposed awardee does not have sufficient qualified personnel and does not have required equipment and facilities to perform support services contract is denied where agency reasonably determined that proposal demonstrated that required personnel are on staff, under commitment to the awardee or are employed by subcontractors, and awardee and subcontractors have required equipment and facilities.

3. General Accounting Office does not review contracting officer's affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of procuring officials, or that definitive responsibility criteria have not been applied. Allegations that awardee is too small, or that it lacks integrity, or that it does not have the facilities, personnel or financial resources required for contract are responsibility issues that are best left to the business judgment of the contracting agency.

DECISION

Electro Design Manufacturing, Inc., protests the award of a contract to United Applied Technologies, Inc., under request for proposals (RFP) No. DAAH01-88-R-0134, a 100 percent small business set-aside issued by the Army for design,

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hardware fabrication, software development, assembly, testing, analysis, documentation and management support for several Army Missile Command programs. The protester maintains that the evaluation of United's proposal was faulty and that for reasons related to both United's capacity and its integrity, United is not a responsible prospective contractor. We deny the protest in part and dismiss it in part.

Under the solicitation, offerors were to propose hourly labor rates for various listed labor categories. In response to Army task orders, the contractor is to propose and negotiate labor categories from the contract for each task order.

The solicitation indicated that the Army was to evaluate the proposals in accordance with three factors: technical, most probable cost and management. The technical and management factors were to include such matters as education and experience of proposed personnel and proposed capabilities/facilities of each offeror. The technical and management criteria were to be evaluated on a "go/no go" basis with only the offers which met the requirements in these areas evaluated for most probable cost. Award under the solicitation was to be made to the firm submitting the lowest cost, technically acceptable offer.

Under the subfactor concerning personnel, to be eligible for award, offerors were to provide information in their proposals, such as letters of intent or written commitments, demonstrating that by direct employment or through subcontractors they had personnel that met the education and experience requirements for 21 listed personnel categories. The capabilities/facilities subfactor indicated that offerors must meet "special standards of responsibility" in order to be considered for award. Under those standards, offerors were required to have a well-equipped fabrication facility including numerous items of equipment, such as lathes, milling machines, drill presses and capabilities such as engraving, non-destruction testing and heat treat capabilities.

Ten firms submitted timely proposals in response to the solicitation. Based on a technical evaluation, the agency sent inquiries to the offerors and all offerors responded. In a subsequent technical evaluation, each of the proposals was rated "go/no go" on the three non-cost evaluation factors, management, personnel, and capabilities/equipment. As a result, five firms were included in the competitive range, with the remainder, including United, excluded. United's proposal was given a "no go" on the management

factor, a "go" on the capabilities/facilities factor and a "no go" on the personnel factor.^{1/} United was notified by letter of August 29, 1988, of its exclusion from the competitive range.

After filing a protest with the contracting officer, which was denied, United filed in United States District Court, Northern District of Alabama (Civil action No. CV88H5450NE) a motion for a temporary restraining order and for preliminary and injunctive relief against the contracting officer's exclusion of United from the competitive range. The United States District Court transferred jurisdiction over the complaint to the United States Claims Court. On January 4, 1989, United and the Justice Department, representing the Army, signed a settlement agreement in which the government agreed to place United in the competitive range.

In accord with the settlement agreement, the contracting officer conducted discussions with United on January 27 and requested second best and final offers (BAFOs) from all the competitive range offerors, including United and the protester. All six competitive range offerors were rated "go" on the non-cost evaluation factors. In accordance with the solicitation evaluation scheme, at this point, the Army reviewed and evaluated the six offerors' BAFO costs. Based on that evaluation, the agency determined that United's evaluated cost of \$4,807,660 was lower than that of the next low offeror, Electro Design, at an evaluated cost of \$4,934,947. As a result, and after a pre-award survey recommendation of award to United, the Army announced that United was the apparent successful offeror. Electro Design protested initially on March 17 and filed additional protest issues on March 20 and May 9. Award has been withheld pending resolution of the protest.

First, the protester argues that the government should not have settled the litigation with United by placing that firm's proposal in the competitive range. According to the protester, United's original proposal was deficient and was correctly excluded from the competitive range. We find that this argument is untimely.

^{1/} The contracting officer's statement submitted with the Army's report on the protest erroneously indicated that United's proposal was "no go" on all non-cost factors. The initial technical evaluation report, however, which was included with the Army's report to our Office, indicates a "go" for United for capabilities/facilities.

By letter dated January 31, 1989, the agency informed all the offerors within the competitive range that a settlement had been reached and that a second round of BAFOs would be solicited. Further, United's court actions had been a matter of public record since October 1988 and the protester does not argue that it did not know of the litigation at the time of the settlement agreement. Since Electro Design was or should have been aware of the basis of protest by late January, it should have either filed its protest prior to the February 17 due date for receipt of second BAFOs or at least have made some timely effort to find the information needed to file such a protest. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988); John W. Gracey, B-232156.2, Jan. 23, 1989, 89-1 CPD ¶ 50.

In any event, we have no objection to the agency's actions in this regard. Federal Acquisition Regulation (FAR) § 15.609(a) provides that, if doubt exists as to whether a proposal is in the competitive range, the proposal should be included and it is our view that, as a general rule, an agency should endeavor to broaden the competitive range since this will maximize competition and provide fairness to the various offerors. See Cotton & Co., B-210849, Oct. 12, 1983, 83-2 CPD ¶ 451. We think that the agency acted reasonably in settling the litigation by including United's proposal within the competitive range. In fact, the propriety of this action is borne out by the fact that, as we will detail below, United's proposal eventually was properly determined to be the lowest acceptable one.

The protester also argues that United's final proposal does not include bona fide letters of commitment from personnel who meet the specific qualifications set forth in the RFP. Further, Electro Design maintains that United does not have the equipment and capabilities that are listed in the solicitation and cannot meet the RFP requirement that design and fabrication efforts be closely integrated within the contractor's plant.

In reviewing protests against allegedly improper evaluations, our Office will not substitute its judgment for that of the contracting agency but, rather, will examine the record to determine whether the agency's judgment was reasonable and in accord with listed criteria. Service Ventures, Inc., B-221261, Apr. 16, 1986, 86-1 CPD ¶ 371. After examining the record, we find that the Army's conclusion that United's proposal was acceptable under the RFP evaluation factors was reasonable.

Although the agency determined that United's initial proposal did not offer sufficient personnel, the Army's technical evaluation panel found that in its BAFO, United corrected all personnel deficiencies and fully met the personnel requirements. A number of personnel requirements were met by employees of subcontractors; nonetheless, this was not prohibited by the solicitation. Based on our review of the Army's evaluation and United's BAFO, we disagree with the protester's contention that United failed to provide the required number of letters of commitment from qualified personnel and, consequently, we have no basis upon which to disagree with the agency's conclusion that United's proposal was properly determined to be acceptable in this area.

With respect to equipment and capabilities, as we explained above, the RFP required that offerors have numerous items of equipment, such as lathes, milling machines and drill presses and capabilities such as engraving, nondestruction testing and heat treat capabilities. Further, the RFP also required that design and fabrication efforts be closely integrated within the contractor's plant.

The Army's final technical evaluation indicates that United and its subcontractors met the equipment and capabilities requirements of the solicitation. The Army submitted to this Office a detailed analysis of United's proposal which indicates that the proposal showed that United and its subcontractors have available all items of equipment and capabilities required by the IFB. Further, the agency's analysis indicates that contracting officials were satisfied with the commitment of United and its subcontractors to meet the requirement that design and fabrication efforts be closely integrated within the contractor's plant. Thus, the record shows that the agency evaluated the United proposal against the RFP requirements related to equipment and capabilities, and we have no basis to disagree with the agency's judgment that United proposed to meet those requirements.

Electro Design, however, argues that the capabilities/facilities requirements are definitive responsibility criteria and suggests that the agency was remiss in merely accepting the material in United's proposal. It is the protester's view that these matters should have been covered by the pre-award survey and the agency's failure to do so amounts to bad faith. Although the section of the RFP related to capabilities/facilities included the notation that those requirements were "special standards of responsibility," these requirements were included with the technical evaluation factors of the RFP. While the

solicitation is somewhat confusing in this regard, the Army evaluated the offeror's capabilities and facilities as part of the technical evaluation of proposals, rather than in its determination of responsibility. Under the circumstances, we think that these matters were properly part of the agency's proposal evaluation. In any event, we fail to understand the point of the protester's argument since, if we were to conclude that the requirements concerning capabilities and facilities were definitive responsibility criteria, we would evaluate the agency's conclusion that United met those requirements using essentially the same standard as we used to review the agency's technical evaluation. Ultra Technology Corp.--Reconsideration, B-230309.4, Nov. 2, 1988, 88-2 CPD ¶ 429. Thus, we have no basis to disagree with the Army's determination, based on a detailed analysis of United's proposal that United met the requirements.

Further, no matter which interpretation of this RFP factor is used, there would be no legal requirement that it be the subject of a pre-award survey. See Kirk Bros. Mechanical Contractors, Inc., B-228603, Nov. 12, 1987, 87-2 CPD ¶ 479. In this respect, we have held that an agency is not required to conduct a pre-award survey at all, if the information readily available is sufficient to allow the contracting officer to make a determination of responsibility. Id. Here, the Army says that a pre-award survey was not necessary because United's proposal indicated that most equipment and facilities for the contract would be provided by United's subcontractors, which have the necessary equipment and facilities. It is clear therefore that the decision not to conduct a pre-award survey on these matters was not made in bad faith.

Electro Design also argues that the Army improperly determined that United is a responsible contractor. The grounds of this position are two-fold. First, the protester maintains that the firm simply is not capable of performing. Second, the protester argues that United lacks the requisite integrity to be considered responsible.

With respect to the first argument, Electro Design asserts that United is so small and so lacking in resources that it could not reasonably be considered capable of performing the work called for by the solicitation. In this connection, the protester also maintains that United does not have sufficient financial resources to support a contract of the magnitude called for by the solicitation. For instance, the protester states that a line of credit on which the agency based its determination of United's financial capability was

in the name of an individual, not United itself, and therefore may not be available to the firm.

In response to these allegations, the Army explains that, based on a partial pre-award survey, United's proposal and discussions with the firm, it determined that United and its subcontractors could perform the contract and that United is a responsible contractor for this procurement. Specifically, the Army explains that United demonstrated by resumes of current employees, letters of commitment and committed subcontractors that it has the required personnel available; by committed subcontractors that it has the required facilities and equipment available; and by a \$200,000 line of credit that it has available the necessary financial resources.^{2/}

Our Office will not review an affirmative determination of responsibility, which is largely a business judgment, unless the protester shows possible fraud or bad faith on the part of procurement officials, or that the solicitation contains definitive responsibility criteria that allegedly have not been applied. 4 C.F.R. § 21.3(m)(5). In our view, allegations by Electro Design that United is too small or that the firm does not have the facilities, personnel and financial resources required for the contract are responsibility issues that are best left to the business judgment of the contracting agency. Thus, since there is no indication in the record that the agency's determinations in these areas were made in bad faith, we will not review these contentions. See HLJ Management Group, Inc., B-225843.6, Mar. 24, 1989, 89-1 CPD ¶ 299. Further, although the protester argues that the Army's partial pre-award survey was not a sufficient basis for the determination of responsibility, as we explained, there is no requirement that an agency conduct a survey at all, if the information readily available to the agency is sufficient to allow the contracting officer to make a determination of responsibility. Kirk Bros. Mechanical Contractors, Inc., B-228603, supra.

In the second portion of its argument concerning United's responsibility, Electro Design maintains that United lacks the integrity to be considered a responsible contractor because United falsely certified in its proposal that it is a small disadvantaged business. In this aspect, Electro Design says that it is unlikely that United was ever owned and managed by socially and economically disadvantaged individuals as defined by FAR § 19.001, but United

^{2/} Contrary to Electro Design's allegation, the line of credit is available to United, not an individual.

nevertheless knowingly certified its status as a small disadvantage firm in order to gain an advantage in this and other federal procurements.

Further, the protester argues that the Army cannot reasonably consider United to be a responsible contractor in light of efforts by representatives of the awardee to convince Electro Design to withdraw its protest in exchange for United's agreement not to participate in a related procurement under RFP No. DAAH01-88-R-0181, and in exchange for United pricing information, conduct which the protester argues was in violation of the Certificate of Independent Price Determination, FAR § 52.203-2. Specifically, Electro Design says that representatives of United contacted an employee of an Electro Design subcontractor after the protest was filed and asked that individual to relay the message to Electro Design that if that firm would withdraw its protest, United would not compete under the related procurement and would provide pricing information which would assure Electro Design of receiving the award on the related procurement. Further, according to the protester, this offer was in essence repeated by counsel for United to counsel for Electro Design.

Electro Design argues that these offers violated the Certificate of Independent Price Determination which was included in both the solicitation under protest and the one in the later related procurement, and which requires offerors to certify that "[n]o attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition." The protester maintains both the alleged false certification of its status as a disadvantaged business and the offers to withdraw the protest demonstrate United's lack of integrity and that, for this reason, United should be found nonresponsible and excluded from participation in both procurements. Further, under these circumstances, Electro Design argues the Army cannot, in good faith, determine that United is a responsible offeror.

The Army notes that the solicitation did not allow an evaluation preference for small disadvantaged businesses and that United received no advantage due to its certification. Further, the Army says that during the source selection it was aware of no information indicating that United improperly certified its status as a disadvantaged business. With respect to the alleged violation of the Certificate of Independent Price Determination, the Army maintains that the protester has not presented information that indicates a violation of United's certificate and says that it referred

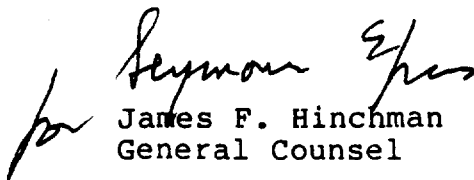
Electro Design's allegations in that regard to the appropriate investigative division. The Army says that after examining the protester's allegations, the contracting officer's affirmative determination of responsibility remains unchanged pending the outcome of that investigation.

Contracting officials are presumed to act in good faith and, in order to establish otherwise, there must be convincing proof that the agency had a malicious and specific intent to harm the protester. Ram II General Contractor, Inc., B-234613, June 7, 1989, 89-1 CPD ¶ ____. Here, we find no showing of bad faith. First, although United's proposal indicated that the firm was a small disadvantaged business and the firm later explained that, due to a change in its ownership, it ceased to qualify as a disadvantaged firm, it is not clear that the firm falsely certified its status. Moreover, since the solicitation provided for no preference to disadvantaged firms, making United's certification irrelevant under this solicitation, the Army's failure to investigate this issue can hardly be considered bad faith.

With respect to the alleged violation of the Certificate of Independent Price Determination, United denies that it made such an offer or tried to induce Electro Design to withdraw the protest. The Army's response to the allegation was to refer the matter to an investigative body. In these circumstances, we do not view the contracting officer's failure to reverse his affirmative determination of responsibility as indicating bad faith. See Industrial Compressor Services, Inc., B-232029.2, Mar. 15, 1989, 89-1 CPD ¶ 272.

Finally, the protester contends that the Army did not properly determine whether United would perform more than 50 percent of the contract work on this procurement set aside for small business as required by 15 U.S.C. § 644(o) (Supp. IV 1986). In response, the Army says that well over half of the labor costs in United's proposal are accounted for by current United employees or individuals who are committed to employment with United. Based on our review of the Army's evaluation and of United's proposal, we have no basis on which to challenge the agency's conclusion in this regard.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel